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# In the Supreme Court of the United States

OCTOBER TERM, 1960

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GEORGE SARA AND EDWARD D. FEURTADO, PETITIONERS

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## MEMORANDUM FOR THE UNITED STATES

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ARCHIBALD COX,
*Solicitor General,*
*Department of Justice,*
*Washington 25, D. C.*

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# In the Supreme Court of the United States

OCTOBER TERM, 1960

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No. 643

GEORGE SABA AND EDWARD D. FEURTADO, PETITIONERS

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## MEMORANDUM FOR THE UNITED STATES

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### OPINION BELOW

The opinion of the court of appeals dismissing the appeal (Pet. App. 5-6) is reported at 282 F. 2d 255.

### JURISDICTION

The judgment of the court of appeals was entered on October 12, 1960. The petition for a writ of certiorari was filed on January 10, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).[1]

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[1] If, as we believe, the order of the district court was one in a criminal case, the petition for a writ of certiorari is

## QUESTION PRESENTED

Whether an order denying a motion to suppress evidence obtained under a search warrant is appealable where the motion was made between the defendant's arrest and the filing of an information, and the order was not entered until after the information had been filed.

## STATEMENT

Petitioners seek review of the order of the Court of Appeals for the Fifth Circuit dismissing their appeal from an order of the District Court for the Southern District of Florida denying their motions for return of property and suppression of evidence.

On January 9, 1960, Agent Hillker of the Internal Revenue Service obtained a warrant to search premises at 1526 N.W. 33rd Street in Miami, Florida, on the basis of an affidavit stating that he had probable cause to believe that the premises were being used for lottery operations in violation of the Internal Revenue laws (R. 4-12). Hillker stated in his affidavit that a confidential source known to be reliable had informed him that certain representatives of lottery houses met at various places to conduct their operations, and the affidavit detailed personal observations at these places prior to January 9 which tended to confirm that information. It also stated that the confidential source had informed Hillker that

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out of time under Rule 22-2 of the Rules of this Court. As appears from the Discussion (see *infra*, pp. 1-7), this issue is intertwined with the merits of the issue which petitioners raise.

a meeting was to be held at the premises for which the warrant was sought on January 9; and that, on the morning of January 9, he had seen a man carrying a large bulging brown paper sack into the premises from an automobile registered by one of the persons described by the informant. There was also an affidavit that only one of the men named had registered as required by federal law (26 U.S.C. 4412). (R. 12-15). At the hearing on the motion to suppress, it was also shown that, while Hillker was obtaining the search warrant on January 9, other agents observed persons who had been previously named going into the premises (R. 90-91).

After obtaining the warrant, the agents knocked on the door, announced that they had a federal warrant and, after receiving no answer, entered (R. 76-78). They observed lottery paraphernalia in the dining and living rooms (R. 78). A number of persons were found in various rooms and told to return to the dining and living rooms. Agent Hillker then told all of them (except the one who was known to have registered) that they were under arrest for accepting wagers without registering (R. 81-82). Five hundred dollars were taken from the person of petitioner Feurtado and eighteen hundred dollars from the jacket of petitioner Saba, which was either on his person or hanging nearby (R. 64, 82-85). Other items were also seized (R. 16-22).

On January 18, 1960, petitioners moved for the return of the money taken from them and for its suppression as evidence (R. 23-31). The district court denied the motion on February 29, 1960, after a

hearing. The court sustained the validity of the warrant and, in addition, found that the agents had probable cause to arrest petitioners for a felony, so that the search was also justified as incident to a lawful arrest (R. 33-37). In the meantime, on February 8, 1960, an information had been filed against petitioners charging them with violations of 26 U.S.C. 4411 and 4412, for failure to register and pay the tax required of persons engaging in gambling operations.

After petitioners noted an appeal from the order of the district court, the government moved to dismiss the appeal. The court of appeals granted the motion on the authority of its decision in *Zacarias* v. *United States*, 261 F. 2d 416, certiorari denied, 359 U.S. 935.

## DISCUSSION

1. In *Zacarias* v. *United States*, 261 F. 2d 416, certiorari denied, 359 U.S. 935, the court of appeals held that, since a motion to suppress, made after the accused has been arrested and afforded a commitment hearing, is incidental to a pending criminal proceeding, the order on the motion was interlocutory and not appealable. When the case came before this Court on petition for a writ of certiorari, the government, although admitting the conflict with decisions in the Second Circuit[2] and with language in opinions in other circuits,[3] suggested that it was unnecessary to

[2] *In re Fried*, 161 F. 2d 453 (C.A. 2); *Cheng Wai* v. *United States*, 125 F. 2d 915 (C.A. 2).

[3] *Freeman* v. *United States*, 160 F. 2d 69 (C.A. 9); *United States* v. *Sinciro*, 190 F. 2d 397 (C.A. 3).

resolve the conflict because the contrary decisions had been rendered prior to the decision of this Court in *Carroll* v. *United States*, 354 U.S. 394 (see the government's brief in opposition, No. 672, O.T. 1958). In *Carroll* the Court had held that the appealability of orders granting a motion to suppress must be determined by ascertaining whether the orders "possess sufficient independence from the main course of the prosecution to warrant treatment as plenary orders * * * " (359 U.S. 403). In *Zacarias*, this Court cited the *Carroll* decision in its order denying certiorari. 359 U.S. 935.

Although the opinion of the Fifth Circuit in *Zacarias* covers the instant case, the facts here do have one feature that was not present there. In *Zacarias*, which involved narcotics, the motion to suppress could serve no purpose beyond that of preventing the use of the evidence in a criminal action, since there was no property which that defendant could get back and there were no indirect consequences beyond the criminal prosecution. Here, the motion is for the return of money to which petitioners were entitled unless it was otherwise subjected to a lien. As was noted in the government's brief in opposition in *Zacarias*, this Court's earlier decisions in *Perlman* v. *United States*, 247 U.S. 7, and in *Go-Bart Importing Company* v. *United States*, 282 U.S. 344, held that orders on motions for return of property brought before indictment were appealable. And this Court's decision in *Carroll*, in discussing the earlier cases, also recognized a possible distinction between a motion merely to suppress and one for the return of property, saying that

orders with respect to suppression had been held appealable in some instances, "perhaps where the emphasis is on the *return of property* rather than its suppression as evidence." 354 U.S. at 403-404.

On the other hand, the possible distinction between the present case and *Zacarias* is more apparent than real on this record. At one point in the proceedings on the motion to suppress, the district court suggested that, since petitioners were seeking only return of the money, the matter could be settled by returning the money without having it suppressed. When petitioner's attorney pointed out that evidence with respect to the money could still be offered, the district court agreed to go ahead with the hearing (R. 65-73). Thus, the main purpose of the motion in this case was to suppress its use as evidence in a criminal case—as was true of *Zacarias*.

2. Since *Zacarias*, the Second Circuit has reaffirmed its earlier decisions holding that a motion to suppress brought before indictment is appealable, even though an indictment is returned before the motion is decided. *Di Bella* v. *United States*, decided November 23, 1960, pending on petition for a writ of certiorari, No. 574, this Term (raising another issue).[4] This decision, which involved a motion to suppress relating to narcotics, is in direct conflict with *Zacarias* and the decision in this case. While *Zacarias* was not mentioned by the Second Circuit, both the decision in *Zacarias* and the citation of *Carroll* by this Court in

[4] Although the Second Circuit held the order refusing suppression to be appealable, it decided against the defendant on the merits.

denying certiorari were called to the attention of the Second Circuit in the government's brief.

3. In these circumstances, we feel bound not to oppose the granting of the petition, although we believe that the ruling below is correct and in accord with the principles embodied in this Court's *Carroll* opinion. The problem is not major but it is recurrent.[5] Since the conflict between the Second and Fifth Circuits has recently been confirmed, with full awareness of the *Carroll* decision, it seems appropriate for this Court to resolve that conflict (cf. *Lott* v. *United States*, No. 238, this Term, certiorari granted, 364 U.S. 813), perhaps by summary affirmance. See *United States* v. *Lone Motor Co.*, 344 U.S. 630.[6]

Respectfully submitted.

ARCHIBALD COX,
*Solicitor General.*

FEBRUARY 1961.

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[5] The *Zacarias*, *Di Bella*, and instant cases have come before the courts of appeals since *Carroll* (decided June 21, 1957).

[6] Under *Carroll*, whether an order on a motion to suppress is immediately appealable turns, not on any mechanical test of whether it is filed before or after indictment, but upon the effect of the order in the criminal proceeding. Here, the purpose of the motion was primarily to prevent the use of the evidence in the criminal case, an issue which can be reviewed if a final judgment of conviction is obtained.

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